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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

U.S. TRUST CORPORATION,

Petitioner,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, FLORIDA DEPARTMENT OF BANKING AND FINANCE, CONFERENCE OF STATE BANK SUPERVISORS, FLORIDA BANKERS ASSOCIATION, and SUN BANK/PALM BEACH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

This petition seeks review of a judgment finding U.S. Trust Corporation's interstate depository subsidiary to be a "bank" and, therefore, subject to the Douglas Amendment of the Bank Holding Company Act of 1956. In that judgment, the Court of Appeals for the Eleventh Circuit reversed an order of the Board of Governors of the Federal Reserve System that concluded that this subsidiary would not be a "bank" under Section 2(c) of the Bank Holding Company Act, because it would not make commercial loans. Section 2(c) defines a "bank" to be an institution that:

> (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans. . . .

12 U.S.C. § 1841(c).

By ignoring Section 2(c)'s commercial loan test the court broadened the "bank" definition significantly beyond its plain meaning and Congress' clear intent. The court's ruling raises serious questions about the status of the many nonbank banks which have been and are being established, on both intrastate and interstate bases, to provide limited financial services. Authorized by the Bank Holding Company Act of 1956, these nonbank banks are an important competitive force in today's changing financial services industry. It is important that the Court correct the court of appeals' misinterpretation of that Act.

The following questions are presented by this case:

(1) Did the court of appeals err when it reversed the Board's order and substituted its own judgment for Section 2(c)'s definition of "bank"?

(2) Did the court of appeals err when it held that the Douglas Amendment prohibits a bank holding company's interstate acquisition of a depository institution that does not make commercial loans and that is therefore not a Section 2(c) "bank"?

PARTIES TO THE PROCEEDING

The caption of the case in this Court lists all the parties to the proceeding.

Pursuant to Rule 28.1 of this Court, U.S. Trust Corporation represents that it has no parent companies or affiliates, and that its subsidiaries (except wholly owned subsidiaries) are Financial Technologies International, Inc., Saudi-U.S. Trust Company, Limited, and Foreign and Colonial Asset Management.

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U.S. TRUST CORPORATION,

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—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, FLORIDA DEPARTMENT OF BANKING AND FINANCE, CONFERENCE OF STATE BANK SUPERVISORS, FLORIDA BANKERS ASSOCIATION, and SUN BANK/PALM BEACH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner U.S. Trust Corporation respectfully requests that the Court issue a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Eleventh Circuit, entered May 20, 1985, which reversed an Order of the Board of Governors of the Federal Reserve System, dated March 23, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (the "Court of Appeals") in this case is reported as *Florida Department of Banking v. Board of Governors*, 760 F.2d 1135 (11th Cir. 1985), and is reproduced in the Appendix hereto (A1 to A17).[1] The March 23, 1985 order (the "Order") of the Board of Governors of the Federal Reserve System (the "Board") is reported as *U.S. Trust Corp.*, 70 Fed. Res. Bull. 371 (1984), and is reproduced in the Appendix hereto (A18 to A25).

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1985. (A1). This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Bank Holding Company of 1956, 12 U.S.C. §§ 1841 *et seq.* (the "BHC Act"). More specifically, this case involves the interpretation of the BHC Act's definition of "bank," 12 U.S.C. § 1841(c) (A26), Section 3(d) of the BHC Act, 12 U.S.C. § 1842(d) (the "Douglas Amendment") (A27), and Section 5(b) of the BHC Act, 12 U.S.C. § 1844(b) (A29).

STATEMENT OF THE CASE

A. The Petitioner

The sole commercial bank subsidiary of petitioner U.S. Trust Corporation, a New York bank holding company[2] ("U.S. Trust"), is located in New York, New York. In November, 1981, both the Florida Department of Banking and Finance and the Federal Reserve Bank of New York authorized U.S. Trust

1 The Appendix to this Petition is cited as "(A ___)".

2 *See* 12 U.S.C. § 1841(a)(1) (A26).

to establish a Florida nondepository trust company subsidiary. From that time until May, 1984, the Florida subsidiary, U.S. Trust Company of Florida, N.A. ("Trust Company"), was operated solely as a nondepository trust company, providing fiduciary, investment advisory and custody services for local customers.

B. The Board's Order

On November 8, 1983, U.S. Trust applied for the Board's approval, pursuant to Section 4(c)(8) of the BHC Act, 12 U.S.C. § 1843(c)(8) (A28 to 29), of the expansion of Trust Company's nonbanking activities to include the acceptance of time and demand deposits and the making of consumer loans.[3] In considering U.S. Trust's application, the Board reviewed voluminous information about the existing operations, management, organization and financial structure of U.S. Trust and of Trust Company, the proposed activities of Trust Company, and other matters. *U.S. Trust Corp.*, 70 Fed. Res. Bull. at 372 (A18 to A19).

On March 23, 1984, the Board approved U.S. Trust's application, subject to conditions which, among other things, prohibited Trust Company from engaging in commercial lending.[4] The Board's Order explained that the approval was reluctantly given, because the Board questioned the *policy* of treating the ownership of any depository entity as a nonbanking activity under the BHC Act. Nonetheless, the Board ruled that

3 In addition, U.S. Trust proposed to convert Trust Company into a nationally chartered institution, and to obtain deposit insurance from the Federal Deposit Insurance Corporation. *U.S. Trust Corp.*, 70 Fed. Res. Bull. at 372 n.2 (A19).

4 Specifically, those conditions were:

(1) Applicant will not operate Trust Company's demand deposit taking activities in tandem with any other subsidiary or financial institution;

(2) Applicant will not link in any way the demand deposit and commercial lending services that define a bank under the Act; and

(3) Trust Company will not engage in any transactions with affiliates, other than the payment of dividends to Applicant or the infusion of capital by Applicant into Trust Company, without the Board's approval.

Id. at 373 (A23).

it was required to approve Trust Company's proposed expansion under the BHC Act, which defines a "bank" to be an institution that:

> (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans. . . .

12 U.S.C. § 1841(c)(A26). Because Trust Company would not make commercial loans, the Board concluded that it would not be a "bank" and would not be subject to the Douglas Amendment's regulation of interstate "bank" acquisitions.

Applying the statutory criteria set forth in Section 4(c)(8) of the BHC Act, 12 U.S.C. § 1843(c)(8) (A28 to 29), the Board concluded that Trust Company's expanded activities would be appropriate non-banking activities and would not result in any "conflicts of interest, unsound banking practices or other adverse effects." 70 Fed. Res. Bull. at 373 (A23).

After issuance of the Board's Order, U.S. Trust converted Trust Company into a chartered national association. This conversion occurred in May 1984, after U.S. Trust obtained the United States Comptroller of the Currency's approval for such a conversion, which approval was also granted on the express condition that Trust Company not make commercial loans. Trust Company now provides fiduciary, investment advisory, and custody services, as well as the demand deposit and non-commercial lending services authorized by the Order.

C. The Court of Appeals' Decision

Pursuant to 12 U.S.C. § 1848, respondents Florida Department of Banking and Finance, Florida Banking Association, Conference of State Bank Supervisors, and Sun Bank/Palm Beach appealed the Board's Order to the Court of Appeals. On May 20, 1985, the Court of Appeals issued its opinion reversing the Board's Order.[5]

5 On June 13, 1985, in response to U.S. Trust's request, the Court of Appeals issued an order staying its mandate to and including August 10, 1985.

Although the court noted that the appeal involved an apparently simple question of statutory construction, it decided that the Board had erred in following the plain language of Section 2(c)'s definition of "bank." The court therefore held that Section 3(a), 12 U.S.C. § 1842(a) (A27), not Section 4, 12 U.S.C. § 1843 (A28), should have controlled whether U.S. Trust's application to expand Trust Company's activities was granted.

The Court of Appeals reasoned that the Order would violate the spirit of the Douglas Amendment by permitting "bank holding companies to establish an unlimited number of deposit-taking banks across state lines without state approval." 760 F.2d at 1141 (A12).[6] The court also concluded that the 1970 addition of the commercial loan test to the "bank" definition was merely a "technical" amendment intended to affect one financial institution and not to change the scope of the Douglas Amendment.

In sum, the Court of Appeals refused to defer to Congress' clear statutory definition of "bank." Rather, the court substituted its own judgment for Congress' and reversed the Board's Order.

REASONS FOR GRANTING THE PETITION

Introduction

This case presents substantial questions of federal law and policy for the nation's financial services industry and for its regulators. The BHC Act contains a definition of "bank," quoted above, that determines the Act's applicability to entities that provide financial services. In concluding that U.S. Trust's Florida subsidiary was a "bank," the Court of Appeals expressly ignored a significant element of the statutory definition,

6 The court also expressed concern that Trust Company's deposits would be money not "available for local development" in Florida. 760 F.2d at 1143 (A14). To the contrary, Trust Company's deposits are used for consumer loans to Florida customers for charitable, household, and family purposes. Indeed, the Board's Order contains a condition that prevents Trust Company from transferring funds, except by corporate dividend, to U.S. Trust in New York. *See supra* note 4.

thereby creating a much broader definition than Congress intended.

By significantly broadening the BHC Act's "bank" definition, the Court of Appeals has raised serious questions about the validity of many "nonbank banks" that have been and are being established, with the Board's approval. Like Trust Company, these nonbank banks provide limited financial services, but not *both* the demand-deposit-taking and commercial lending services in the Act's definition of "bank."[7]

The changing financial services industry of the 1980's exists in a far more competitive environment than did the banking industry of previous decades. By providing limited financial services on intrastate and interstate bases, manufacturing firms, insurance companies, and securities firms have become an increasingly "competitive threat" to traditional bank holding companies.[8] Unlike bank holding companies, such firms are not subject to the BHC Act. To respond to this growing competition, bank holding companies have developed nonbank banks as a means of providing limited financial services on an interstate basis. By essentially prohibiting nonbank banks, the Court of Appeals' opinion places bank holding companies at a severe competitive disadvantage vis-à-vis their financial service competitors. This result clearly contradicts Congress' intent, when amending the BHC Act in 1970, to provide broader authority for bank holding companies to engage in activities "closely related to banking" to respond to competitive and technological changes in the financial services industry.[9]

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7 *See* D.D. Whitehead, *Interstate Banking: Probability or Reality?* Economic Review, Federal Reserve Bank of Atlanta, March 1985, at 6, 17 (nonbank banks "engage in only one of two activities that define a bank, either accepting demand deposits or making commercial loans").

8 As the Federal Reserve Bank of Chicago reported in a recent study, "in 1981, these nonbank companies posed a competitive threat to banks and other depository institutions in a number of their traditional product lines." Federal Reserve Bank of Chicago, *Banks and Nonbanks: The Horse Race Continues*, Economic Perspectives, May/June 1985, at 4, 16.

9 *See infra* at 15-16.

The importance of nonbank banks is illustrated by their quickly growing numbers. As even the Court of Appeals acknowledged, there has been an "avalanche" of applications to establish nonbank banks. (A6). As of June 28, 1985, the United States Comptroller of the Currency (the "Comptroller") had received 368 applications to charter interstate nonbank banks. (A35). As of December 21, 1984, the Comptroller had approved interim charters for 130 nonbank banks.[10] To date, the Board has approved 23 nonbank bank applications.[11]

The Court of Appeals' broad reinterpretation of "bank" affects not only the nonbank banks recently approved by the Board and Comptroller. It also affects the many nonbank banks that are not subject to the BHC Act because their owners are not presently deemed to be bank holding companies.[12] It may also affect other depository institutions (such as industrial banks) that have operated for several decades, but have not been considered "banks" under the BHC Act.[13]

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10 *See* OCC Release, [Current] Fed. Banking L. Rep. (CCH) ¶ 86,141 (Dec. 21, 1984).

11 In addition to approving U.S. Trust's application, 70 Fed. Res. Bull. 371 (1984), the Board has approved 9 bank holding companies' applications to operate a total of 22 nonbank banks. *Mellon National Corp.*, 71 Fed. Res. Bull. 256 (1985); *Maryland National Corp.*, 71 Fed. Res. Bull. 253 (1985); *The Chase Manhattan Corp.*, 71 Fed. Res. Bull. 249 (1985); *Irving Bank Corp.*, 71 Fed. Res. Bull. 173 (1985); *First National State Bancorp.*, 71 Fed. Res. Bull. 115 (1985); *Suburban Bancorp.*, 71 Fed. Res. Bull. 61 (1985); *Bank of Boston Corp.*, 71 Fed. Res. Bull. 55 (1985); *Bankers Trust Corp.*, 71 Fed. Res. Bull. 51 (1985); *First Interstate Bancorp.*, 70 Fed. Res. Bull. 660 (1984).

12 As mentioned above, insurance companies, securities firms and industrial firms have also established many nonbank banks. Federal Reserve Bank of Chicago, *Banks and Nonbanks: The Horse Race Continues*, Economic Perspectives, May/June 1985, at 5. If these nonbank banks are deemed to be "banks" in light of the Court of Appeals' decision, their owners would become bank holding companies and would be subject to the BHC Act. This result would have an extremely severe impact on the parent firms' operations since the BHC Act prohibits a bank holding company from engaging in activities not closely related to banking.

13 In 1983, the American Financial Services Association estimated that there were approximately 1,082 industrial banks, with assets of over $7 billion, in operation in 2,441 locations nationwide. American Financial

This petition also presents an important question concerning the Court of Appeals' appropriate role in interpreting the BHC Act. The court's opinion simply ignores the commercial loan test in Congress' "bank" definition and concludes that Trust Company is a "bank" solely because it receives demand deposits. By eliminating from the "bank" definition one element (the commercial loan test) that Congress added in 1970 for the express purpose of narrowing that definition, the court impermissibly attempted to function as a legislature. Only Congress—not the Court of Appeals—can amend the BHC Act.

In addition, this petition presents for Court's resolution an important conflict between the Court of Appeals' decision, on the one hand, and decisions of the Court of Appeals for the Tenth Circuit (the "Tenth Circuit") and of this Court. The Court of Appeals expressly acknowledged that its opinion is "in conflict with some of the language used by the Tenth Circuit" in *Dimension Financial Corp. v. Board of Governors*, 744 F.2d 1402 (10th Cir. 1984), *cert. granted*, 105 S. Ct. 2137 (1985) ("*Dimension*"). 760 F.2d at 1142 n.15 (A13). In *Dimension*, the Tenth Circuit invalidated a Board regulation which attempted to expand the meaning of "commercial loan" as used in the BHC Act's definition of "bank." The Tenth Circuit concluded that Congress had enacted a specific statutory definition of "bank" and that the Board did not have the jurisdiction or statutory authority to modify that definition by regulation.

Although *Dimension* has significant implications for the present case, this Court's ruling there cannot resolve the issues raised herein. This case involves U.S. Trust's interstate ownership of a depository institution that clearly makes no commercial loans (even under the expanded definition of commercial loan that is at issue in *Dimension*). This case also raises important questions, not raised in *Dimension*, concerning the application of the Douglas Amendment and Section 2(c)'s "bank" definition to a strictly depository institution.

Services Association, Industrial Banks as Thrift Institutions, at 13 (1983).

The Court of Appeals' ruling also conflicts with this Court's decision in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980) ("*Lewis*"). In *Lewis*, this Court held that the Douglas Amendment applies only to the acquisition of a "bank" as defined in the BHC Act, and not to the acquisition of entities engaged in nonbanking activities. In this case, however, the Court of Appeals held that the Douglas Amendment governs the acquisition of a depository institution that is not a "bank" under the BHC Act.

I. THIS PETITION PRESENTS AN IMPORTANT FEDERAL QUESTION

The BHC Act is a comprehensive federal regulatory statute. Congress first enacted the BHC Act in 1956, and amended it in 1966 and again in 1970. (A31). With each amendment, Congress debated and made significant changes in the Act's definition of "bank" and in the scope of the Act's application to bank holding companies. The language of the statute, as amended in 1970, and the legislative history of the BHC Act show that—contrary to the Court of Appeals' belief—Congress' 1970 amendment of the "bank" definition was *not* a "technical" amendment; it reflected a clear congressional decision that any entity that receives demand deposits, but does not make commercial loans, is not a "bank." The legislative history also shows that Congress did not intend the 1956 Douglas Amendment to regulate the interstate acquisition of an entity that is not a "bank" under Section 2(c).

A. The Plain Meaning of the BHC Act

This case, as the Court of Appeals acknowledged, presents a clear question of interpretation of the BHC Act's definition of "bank."[14] In its Order, the Board concluded that it was bound to follow this definition even though it disagreed, as a matter of policy, with the result. The court, on the other hand, com-

14 760 F.2d at 1138-39 (A6). Indeed, the court conceded that "the words used by Congress to define bank [are] clear in the sense that a meaning is intelligible." 760 F.2d at 1139 (A7).

pletely ignored Congress' "bank" definition and incorrectly substituted its own judgment as to which interstate bank holding company activities are governed by the Douglas Amendment.

The BHC Act defines the term "bank," in specific and unambiguous terms, to be an institution that:

> (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans. . . .

12 U.S.C. § 1841(c) (A26). The Board, the agency charged with administering the BHC Act,[15] has promulgated a regulation that adopts this definition of "bank"[16] and has consistently followed the definition in its rulings.[17]

It is a well-established doctrine of statutory construction that administrative agencies and the courts must follow the plain

15 *Northeast Bancorp, Inc. v. Board of Governors*, 105 S. Ct. 2545, 2551 (1985) (the Board is "an authoritative voice on the meaning of a federal banking statute"), *aff'g*, 740 F.2d 203, 207 (2d Cir. 1984) ("[t]he Board is the agency responsible for federal regulation of the national banking system and its interpretation of a federal banking statute is entitled to substantial deference"); *Securities Indus. Ass'n v. Board of Governors, 104 S. Ct. 2979 (1984). See also Securities Indus. Ass'n v. Board of Governors*, 104 S. Ct. 3003, 3009 (1984) ("the Board has primary responsibility for implementing the Glass-Steagall Act, and we accord substantial deference to the Board's interpretation of the Act whenever its interpretation provides a reasonable construction of the statutory language and is consistent with legislative intent"); *Board of Governors v. Investment Co. Inst.*, 450 U.S. 46, 56-57 n.21 (1981) (the Board's interpretation of the Glass-Steagall Act "should be overturned only where there is no reasonable basis to sustain it or where they exercise it in a manner which clearly exceeds their statutory authority"); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

16 12 C.F.R. § 225.2(a)(1) (A30).

17 *See, e.g., Citizens Fidelity Corp.*, 69 Fed. Res. Bull. 556 (1983); *Citicorp*, 69 Fed. Res. Bull. 921 (1983); *First Bancorporation*, 68 Fed. Res. Bull. 253 (1982). *See also supra* note 11. The Order is therefore entitled to particular deference. *Securities Indus. Ass'n v. Board of Governors*, 104 S. Ct. at 3009; *Board of Governors v. Investment Co. Inst.*, 450 U.S. at 56-57; *Board of Governors v. First Lincolnwood Corp.*, 439 U.S. 234, 248, 251 (1978). *Accord Aluminum Co. of Am. v. Central Lincoln Peoples' Utility Dist.*, 104 S. Ct. 2472 (1984); *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977).

meaning of an applicable federal statute. As this Court has recently held:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 104 S. Ct. 2778, 2781-82 (1984).[18]

In this case, Congress has spoken directly to the precise question of what a "bank" is for purposes of the BHC Act, including the Douglas Amendment. The Court of Appeals was bound to follow Congress' clear, stated intent.

B. The Legislative History of the "Bank" Definition

The Court of Appeals purported to rely upon the BHC Act's legislative history to support its decision not to follow the plain meaning of the "bank" definition. In effect, the court ignored the 1970 amendment to this definition, concluding that that amendment was intended only to exempt a single institution (the Boston Safe Deposit & Trust Company, hereinafter "Boston Safe") from the BHC Act. This interpretation is particularly ironic, because Boston Safe provides services (making consumer loans and receiving demand deposits)[19] that are substantially similar to those that the Board's Order permitted U.S. Trust's subsidiary to provide. In other words, U.S. Trust's subsidiary provides services essentially identical to those provided by an institution that the Court of Appeals conceded is not a "bank" under the BHC Act.

18 *Accord Central Trust Co. v. Official Creditors' Comm.*, 454 U.S. 354, 359-60 (1982); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *First Bancorp. v. Board of Governors*, 728 F.2d 434, 436 (10th Cir. 1984).

19 *See* A32 to A34.

Instead, the court decided that the 1956 Douglas Amendment to the BHC Act governs U.S. Trust's interstate operation of any depository institution. These conclusions about the 1970 amendment and the Douglas Amendment simply misinterpret the legislative history of those provisions.

1. The 1966 Amendments

The original BHC Act of 1956 defined "bank" to include all institutions with a federal or state banking charter. In 1966, Congress concluded that this definition was too broad and amended the BHC Act to narrow the definition to include only institutions that "accept deposits that the depositor has a legal right to withdraw on demand." This amendment was intended to limit the BHC Act's scope to commercial banks—entities whose business could cause the concentration of commercial credit that concerned Congress.[20]

In 1966, Congress focused on two classes of entities—savings banks and industrial banks—that it did not wish to regulate as "banks" because they did not make commercial loans. Indeed, Congress expressly intended 1966 amendment to exclude these entities.[21] Because these chartered banks did not accept deposits subject to a legal right of withdrawal upon demand, Congress was able to exclude them by adopting a demand-deposit test to define "bank."

During Congress' consideration of the 1966 amendments, the proposed demand-deposit definition was itself criticized as overly broad because it still reached some institutions that were not commercial banks. In a letter to the Senate Banking and

20 The legislative history shows that Congress' concern in 1966 was to regulate only bank acquisitions that could cause an undue concentration of commercial lending power. For example, the Senate Banking and Currency Committee's report on the 1966 amendments stated:

> The purpose of the [Bank Holding Company Act] was to restrain undue concentration of control of commercial bank credit and to prevent abuse by a holding company of its control over this type of credit for the benefit of its nonbanking subsidiaries.

S. Rep. No. 1179, 89th Cong., 2d Sess. 7, *reprinted in* 1966 U.S. Code Cong. & Ad. News 2385, 2391.

21 The Senate Banking and Currency Committee's report on the 1966 amendments also stated:

Currency Committee, Boston Safe's corporate parent proposed that the definition focus on Congress' real concern— concentration of commercial lending power—and therefore be limited to depository entities that make commercial loans. The letter stated:

> We believe that the proposed amendment to section 2(c) needs modification to accomplish its objective of limiting the application of the act to commercial banks. The amendment fails because it emphasizes the source of funds rather than the use to which funds are put. We suggest that the use of funds is the relevant factor since if a bank does not engage in commercial lending, it cannot commit any of the hypothetical abuses which bank holding company legislation is designed to prevent.[22]

While this proposal was not enacted in 1966, it was subsequently enacted in 1970.

2. The 1970 Amendments

By the late 1960's, a large number of one-bank bank holding companies had developed and were becoming increasingly significant as commercial lenders. They were not, however, subject to the BHC Act. In 1970, Congress brought these one-bank holding companies within the BHC Act to regulate

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This objective can be achieved without applying the act to savings banks, and there are at least a few instances in which the reference to 'savings bank' in the present definition may result in covering companies that control two or more industrial banks. To avoid this result, the bill redefines 'bank' as an institution that accepts deposits payable on demand (checking accounts), the commonly accepted test of whether an institution is a commercial bank so as to exclude institutions like industrial banks and nondeposit trust companies.

Id. See also 102 Cong. Rec. 6957 (1956) (statement of Sen. Robertson).

22 Letter from William W. Wolbach, President, The Boston Co., Inc., to Sen. A. Willis Robertson, Chairman, Senate Comm. on Banking and Currency (April 28, 1966), *reprinted in Amend the Bank Holding Company Act of 1956: Hearings Before a Subcomm. of the Senate Comm. on Banking and Currency*, 89th Cong., 1st Sess. 732-33 (1966).

their potential ability to control a significant portion of the country's commercial credit.[23]

By bringing one-bank holding companies under the BHC Act, Congress significantly expanded the number of regulated bank holding companies. To avoid making the BHC Act overbroad, Congress narrowed the Act's "bank" definition to exclude institutions, the ownership of which did not present the type of harm (that is, the undue control of commercial lending) that concerned Congress.[24] This narrowing was accomplished by amending the definition to its present form, to cover only entities that make commercial loans as well as receive demand deposits.

The 1970 legislative history does not support the Court of Appeals' conclusion that this 1970 amendment was intended only to exempt Boston Safe (again, an entity that provides services essentially identical to those Trust Company provides).[25] This amendment was proposed and supported not only by Boston Safe,[26] but also by the Board, which recognized its general applicability.[27] The congressional committees that con-

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23 *E.g., Hearings on H.R. 6778 Before the House Comm. on Banking and Currency*, 91st Cong., 1st Sess. 200-01 (1969) (comments of William McChesney Martin, Jr., Chairman, Federal Reserve Board); *id.* at 196-97 (comments of William McChesney Martin, Jr., Chairman Federal Reserve Board), *quoted in* S. Rep. No. 1084, 91st Cong., 2d Sess. 3, *reprinted in* 1970 U.S. Code Cong. & Ad. News 5519, 5521-22.

24 For example, the Senate Banking and Currency Committee's report on the 1970 amendments states that the amendment to the bank definition was intended to exclude those "institutions not engaged in commercial banking, since the purpose of the act was to restrain undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit." S. Rep. No. 1084, 91st Cong., 2d Sess. 24, *reprinted in* 1970 U.S. Code Cong. & Ad. News 5519, 5541.

25 *See* A32.

26 Letter from William W. Wolbach, President, The Boston Co., Inc. to Sen. A. Willis Robertson, Chairman, Senate Comm. on Banking and Currency (April 28, 1966), *reprinted in Amend the Bank Holding Company Act of 1956, Hearings Before a Subcomm. of the Senate Comm. on Banking and Currency*, 89th Cong., 1st Sess. 732-33 (1966).

27 The Board supported this proposal in 1966 and in 1970. In 1966, the Board expressed its view that the amendment would exclude from the

sidered the 1970 amendments also understood that the new "bank" definition would reach institutions other than Boston Safe. For example, the report of the House Banking Committee explains the amendment as an "exemption from coverage of the Act for *any company* which is chartered as a bank but which does not make commercial loans."[28]

The 1970 amendments to the BHC Act also expanded the Board's authority to permit a bank holding company to engage in nonbanking activities "so closely related to the business of banking or of managing or controlling banks as to be a proper incident thereto." 12 U.S.C. § 1843(c)(8) (A28). This amendment was intended to permit bank holding companies to adjust to competitive and technological changes in the financial services industry by engaging in additional, innovative nonbanking activities.[29] It was pursuant to this amended provision that the

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BHC Act's coverage all entities that did not make commercial loans. The Board's chairman wrote the Senate Banking and Currency Committee that the Board was:

> impressed by the argument that a bank which does not make commercial loans is not apt to be involved in the kind of abuses the act is designed to prevent.

112 Cong. Rec. 12386 (1966).

28 H.R. Rep. No. 1747, 91st Cong., 2d Sess. 22, *reprinted in* 1970 U.S. Code Cong. & Ad. News 5561, 5573 (emphasis added). The Senate Banking and Currency Committee's report noted that the amendment was designed to exempt those "*institutions* that are not engaged in the business of making commercial loans from the definition of 'bank'." S. Rep. No. 1084, 91st Cong., 2d Sess. 24, *reprinted in* 1970 U.S. Code Cong. & Ad. News 5519, 5541 (emphasis added).

29 S. Rep. No. 1084, 91st Cong., 2d Sess. 13, *reprinted* in 1970 U.S. Code Cong. & Ad. News 5519, 5531. Thus, in 1970, Congress clearly adopted the policy that holding companies could engage even in nonbanking activities not specifically foreseeable at that time. In its Report, the Senate Committee on Banking and Currency agreed with the statement by FDIC Chairman Frank Wille that:

> Inasmuch as the economy and its financial requirements are constantly changing, the Corporation considers it essential that banks and bank holding companies have the flexibility to engage in new types of bank-related activities that may be needed now and in the future if the financial needs of the people are to be met efficiently, competitively, and at a reasonable cost. Likely changes in technology, the nature of

Board authorized U.S. Trust's application to expand Trust Company's nonbanking activities.

C. The Legislative History of The Douglas Amendment

The Court of Appeals gave little weight to the BHC Act's 1970 definition of bank and focused principally on the legislative history of the 1956 Douglas Amendment. The Douglas Amendment, the court concluded, was intended to prohibit the interstate ownership of any depository institution. This conclusion simply mischaracterizes the Douglas Amendment's legislative history.

The Douglas Amendment principally reflected Congress' concern to prevent the development of any monopoly over commercial *credit*. The Douglas Amendment was added to the BHC Act as a Senate floor amendment, after the bill had been reported out of the Senate and House Banking and Currency Committees. When introducing it, Senator Douglas emphasized that his amendment resulted from a concern for the need to regulate the size and economic power of entities that made commercial loans.[30] In his remarks, which constitute the principal legislative history of the Douglas Amendment,[31] Senator

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financial competition and the economic and legal functions of commercial banking all lead to a conclusion that retaining such flexibility is the wise course for the future.

S. Rep. No. 1084, 91st Cong., 2d Sess. 13, *reprinted* in 1970 U.S. Code Cong. & Ad. News 5519, 5531, *quoting One-Bank Holding Company Legislation of 1970: Hearings on S. 1052, et al. Before the Senate Comm. on Banking and Currency*, 91st Cong., 2nd Sess. 173 (1970). *See also* 116 Cong. Rec. 31823 (1970) (statement of Sen. Sparkman, Chairman, Senate Comm. on Banking and Currency).

30 102 Cong. Rec. 6857 (1956) (for instance, Douglas stated, "[f]or he who controls the credit of a country controls the industry of that country and, ultimately, the political life of the Nation as well").

31 As this Court recently held:

[The Douglas Amendment's] entire legislative history is confined to the Senate debate. In such circumstances, the comments of individual legislators carry substantial weight, especially where they reflect a

Douglas explained at length that his amendment's principal purpose was to avoid the monopolization of commercial credit that he perceived to have developed in Britain, Germany and other European countries as a result of a few banks' abilities to allocate commercial credit.[32] This purpose is certainly not contradicted by the Board's Order in this case, which prohibits Trust Company from making any commercial loans.

Senator Douglas also intended the Douglas Amendment to give each state the authority to determine whether its banks could be acquired by out-of-state bank holding companies. In proposing the Amendment, the Senator stated:

> Our amendment will permit out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them. . .

Id. at 6858. Senator Douglas expressed his concern with "bank" acquisitions simultaneously with his principal concern for the monopolization of commercial lending. He did not express any concern for depository institutions that did not make commercial loans. He certainly did not propose that "bank" have a different definition for the Douglas Amendment than for other provisions of the BHC Act.

In 1956, Congress knew that some existing depository institutions—"industrial" (or "Morris Plan") banks[33]—did not make commercial loans. The 1956 legislative history shows that Congress did not intend these institutions to be within the scope

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consensus as to the meaning and objectives of the proposed legislation though not necessarily the wisdom of that legislation.

Northeast Bancorp, Inc. v. Board of Governors, 105 S. Ct. at 2551.

32 102 Cong. Rec. 6857 (1956). In addition, Senator Douglas expressed concern that such a monopoly over commercial credit might, as it had in Britain and Germany, allow nonbanking entities that were affiliated with banks to develop unfair commercial advantages because they had substantially greater access to commercial loans than their competitors had. *Id.*

33 These industrial, or Morris Plan, banks made consumer, but not commercial loans. They also received deposits in a number of forms determined by state law. *See generally* American Financial Services Association, Industrial Banks as Thrift Institutions (1983).

of the BHC Act's definition of "bank" or to be governed by the Douglas Amendment. *E.g.*, 102 Cong. Rec. 6957 (1956) (statement of Sen. Robertson); 101 Cong. Rec. 3823 (1955) (statement of Rep. Spence). *See also Applicability of the Bank Holding Company Act to Industrial Banks*, 49 Fed. Res. Bull. 166 (1963). Indeed, in 1956, Congress was aware of instances in which industrial banks were owned on an interstate basis.[34] In sum, this 1956 legislative history clearly shows that Congress did not intend the Douglas Amendment to govern the interstate ownership of all depository institutions.[35]

D. Conclusion

The legislative history of the BHC Act does not establish any congressional purpose that is contradicted by U.S. Trust's operation of its Florida depository nonbank bank subsidiary.

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34 *Bank Holding Legislation: Hearings on S.76 and S.1118 Before the Senate Comm. on Banking and Currency*, 83rd Cong., 1st Sess. 328–33 (1953) (statement of E. Huntington, President, Morris Plan Corp. of America) (Financial General Corporation, the parent company of the "Morris Plan System," had a controlling interest in 18 industrial banks in various cities throughout the country); *id.* at 631-55 (statement of Walter S. Burtelow, Exec. Vice President, General Contract Corp.) (General Contract Corp. of St. Louis had controlling interest in industrial banks located in at least 3 states); R.J. Saulnier, *Industrial Banking Companies and Their Credit Practices* 13, 23–25 (1940).

35 Thus, the Court of Appeals' holding that the Board "should have used its power under § 5(b) . . . to prevent evasion by U.S. Trust of the fundamental purposes of the Act," 760 F.2d at 1143 (A16), is totally unsupported by the legislative history. This holding is also totally unsupported by the case the Court of Appeals cited to support this conclusion. In *Wilshire Oil Co. v. Board of Governors*, 668 F.2d 732 (3d Cir. 1981), the Third Circuit held that an institution which made commercial loans and took demand deposits was not rendered a nonbank by a letter the institution sent to its depositors. The letter stated that the institution reserved the right to require 14 days notice prior to withdrawal, but that it did not intend to exercise that right. As the Court of Appeals acknowledged, "*Wilshire* is distinguishable in the sense that the bank was blatantly trying to evade the Act. . ." 760 F.2D at 1144 (A16). Here, U.S. Trust applied to the Board and the Comptroller, and received their approval. U.S. Trust expanded Trust Company's activities only after it had received these official sanctions.

That subsidiary does not make commercial loans, and therefore cannot and does not threaten the monopolization or misuse of commercial credit that concerned Congress when it enacted and amended the definition of "bank." To the contrary, that subsidiary offers services essentially identical to those of Boston Safe, an institution that the court acknowledged was beyond the scope of the BHC Act and the Douglas Amendment.

The Court of Appeals was apparently concerned that the Board's Order would result in an "avalanche" of nonbank banks that Congress might not have specifically foreseen. 760 F.2d at 1138 (A6). Such a concern, however, is not a valid reason for modifying, by judicial interpretation, the clear language of Congress' "bank" definition.[36] It is for Congress, not the Court of Appeals, to change, if it wishes, the BHC Act's existing definition of "bank."

II. COURT OF APPEALS' DECISION CONFLICTS WITH DIMENSION AND LEWIS

The Court of Appeals' decision attempts to change the BHC Act's "bank" definition by simply ignoring Congress' 1970 addition of the commercial loan test to that definition. As the Court of Appeals itself noted, the decision conflicts in this regard with the recent analysis of the BHC Act in *Dimension*.[37] The Court of Appeals' decision also conflicts with this Court's opinion in *Lewis*. The Tenth Circuit's opinion in *Dimension* is presently before this Court. Although that case has substantial substantial relevance here, its outcome cannot resolve the more significant issues presented by this case.

A. Dimension

In *Dimension*, the Tenth Circuit invalidated a 1982 Board order that revised the Board's Regulation Y[38] to treat certain

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36 As this Court stated in its recent opinion in *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713, 1719 (1985), "[n]o legislature can be expected to catalog all of the anticipated effects of a statute. . . ."

37 760 F.2d at 1142 n.15 (A13).

38 Regulation Y is the Board's adoption of the BHC Act's definition of "bank." *See* 12 C.F.R. § 225.2(a)(1) (A30).

money market and interbank transactions as "commercial loans" within the commercial loan test in the BHC Act's "bank" definition. The Tenth Circuit held that these revisions were an impermissible departure from the meaning of "commercial loan" that Congress had intended when it added the commercial loan test to the "bank" definition in 1970. Thus, the Tenth Circuit's opinion, which concluded that the Board had no statutory authority to expand its jurisdiction by deviating from Congress' intended meaning of commercial loan, has important implications that conflict with the Court of Appeals' opinion in the present case.[39]

However, in at least the four following regards, *Dimension* cannot provide a basis for this Court's resolution of the more significant issues raised by the present case:

—Even if this Court concludes that the regulation at issue in *Dimension* is valid, that regulation would not affect U.S. Trust's subsidiary. Trust Company does not make commercial loans, even as defined by that regulation.

—The *Dimension* case involves the applicability of the commercial loan test to money market and interbank transactions, activities more significant to nonbank banks owned by firms other than bank holding companies. Thus, *Dimension* does not address activities significant to nonbank banks owned by bank holding companies which, unlike their competitors, are already subject to the BHC Act. It would be ironic and unfair if U.S. Trust could not (under the Court of Appeals' decision) operate an interstate nonbank bank while its competitors would operate such nonbank banks (however this Court resolves the *Dimension* case).

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39 While specifically ruling on the Board's authority to define "commercial loans," the Tenth Circuit opinion in *Dimension* concludes more generally that the Board cannot modify the BHC Act's definition of "bank." The Tenth Circuit also concluded that this definition "permitted the development of nonbank banks," 744 F.2d at 1407, and that any change in the definition, if desirable, would have to be made by Congress, *id.* at 1407, 1410.

—The *Dimension* case does not involve the applicability of the Douglas Amendment to the interstate ownership of a depository nonbank bank.

—The *Dimension* court did not interpret the BHC Act's full definition of "bank" as applied to a depository nonbank bank that does not make commercial loans.

B. Lewis

In *Lewis*, this Court held unconstitutional two Florida statutes that prohibited out-of-state entities from conducting investment advisory and trust services within Florida. One statute prohibited out-of-state banks, trust companies, and bank holding companies from owning Florida investment or trust businesses, 447 U.S. at 37, while the second statute prohibited all corporations except state-chartered banks and national banks having their operations in Florida from performing specified fiduciary functions, 447 U.S. at 50. The Court held that these statutes violated the Commerce Clause.

In reaching its conclusion that Congress had not delegated to the states the authority to regulate interstate acquisitions of nonbank banks, the Court held that the Douglas Amendment does not govern such acquisitions. The court noted that:

> the structure of the [BHC] Act reveals that [the Douglas Amendment] applies only to holding company acquisitions of banks. Nonbanking activities are regulated separately in § 4, which does not contain a parallel provision.

447 U.S. at 47.

In the present case, however, the Court of Appeals held that the Douglas Amendment does prohibit an out-of-state bank holding company from acquiring a depository nonbank bank, without prior state approval. This conclusion directly conflicts with this Court's *Lewis* opinion.

Conclusion

For the reasons stated above, the Court should grant U.S. Trust Corporation's petition for a writ of certiorari.

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August 5, 1985

APPENDIX

Nos. 84-32269, 84-3270.

Opinion of United States Court of Appeals

FOR THE ELEVENTH CIRCUIT
(760 F.2D 1135)

FLORIDA DEPT. OF BANKING v. BOARD OF GOVERNORS

FLORIDA DEPARTMENT OF BANKING AND FINANCE,
Petitioner,

—v.—

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent.

FLORIDA BANKERS ASSOCIATION,
AND SUN BANK/PALM BEACH,
Petitioners,

—v.—

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent.

MAY 20, 1985

On Review of an Order of the Board of Governors
of the Federal Reserve System

Before RONEY and TJOFLAT, Circuit Judges, and BROWN*, Senior Circuit Judge.

BROWN, Circuit Judge:

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* Honorable John R. Brown, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

I. Overview

This action is a petition, pursuant to 12 U.S.C. § 1848, for review of an order of the Board of Governors of the Federal Reserve System (the Board). In its order,[1] the Board, acting pursuant to the Bank Holding Company Act of 1956 (as amended), 12 U.S.C. § 1841 *et seq.*, approved the application of a New York bank holding company, U.S. Trust, to expand the nonbanking activities of its wholly owned Florida subsidiary (Trust Company).

II. The Legislative Framework

The Bank Holding Company Act (the Act) constitutes a comprehensive federal framework for the supervision and regulation of bank holding companies—companies that control one or more banks. Section 2(c) of the Act contains the statutory definition of "bank." Bank is defined as any institution that: (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans. 12 U.S.C. § 1841(c). Section 3 of the Act deals with a bank holding company's acquisition of banks. 12 U.S.C. § 1842(a). Under this section, a bank holding company may not acquire control of any additional bank without prior approval of the Board. Section 3(d) of the Act,[2] com-

1 The order was dated March 23, 1984.

2 Notwithstanding any other provision of this section, no application (except an application filed as a result of a transaction authorized under section 1823(f) of this title) shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

monly referred to as the "Douglas Amendment," prohibits the Board from approving the acquisition of any bank by a bank holding company whose principal operations are conducted in another state, unless the acquisition of the bank by an out-of-state bank holding company is expressly authorized by the statute laws of the state in which the bank to be acquired is located. 12 U.S.C. § 1842(d). In other words, the Douglas Amendment proscribes interstate bank acquisitions by bank holding companies unless the state where the bank to be acquired allows such acquisitions by statute. Section 4 of the Act deals with the regulation of nonbank activities. Section 4 generally prohibits a bank holding company from acquiring an entity engaged in nonbank activity. Section 4(c)(8) of the Act contains the principal exception to this prohibition. It authorizes board approval of acquisitions of nonbanking activities which are "closely related" to and a "proper incident" of banking. Section 5 of the Act confers certain enforcement powers upon the Board. Specifically, § 5(b), 12 U.S.C. § 1844(b), authorizes the Board to issue regulations and orders to carry out the purposes of the Act and to prevent evasions of it.

III. The U.S. Trust Application

U.S. Trust is a bank holding company whose sole commercial bank subsidiary is located in New York, New York. On November 8, 1983, U.S. Trust applied for the Board's approval of a proposal to expand the nonbanking activities of its nonbanking subsidiary in Florida. The proposed expansion included the acceptance of time and demand deposits (including checking accounts) and the making of consumer loans. U.S. Trust's Florida subsidiary had previously been established as a Florida chartered nondeposit trust company. This subsidiary had provided fiduciary, investment, advisory, and custody services to its clients in Palm Beach, Florida. In May of 1984, U.S. Trust completed the conversion of its state chartered trust subsidiary into a national association, called Trust Company. It is now U.S. Trust's only subsidiary in Florida. Trust Company continues to provide the above mentioned trust services, as well as the

services now authorized by the Board's order. This conversion occurred with the approval of the United States Comptroller of the Currency. Specifically, the Comptroller approved the conversion of Trust Company into a nonbank on the express condition that Trust Company "not engage in the business of making commercial loans."

IV. Action of the Board

After the Board issued public notice of U.S. Trust's application, the Florida Department of Banking and Finance, the Florida Bankers Association, and the Sun Bank/Palm Beach filed comments and requested that the Board conduct a hearing on the U.S. Trust application.[3]

The Board issued its order approving U.S. Trust's application for Trust Company to operate as a nonbank on March 23, 1984. That order specified several conditions for approval of the application. U.S. Trust was ordered to not:

(1) operate Trust Company's demand deposit-taking activities in tandem with any other subsidiary or other financial institutions;

(2) link in any way the demand deposit and commercial lending services that define a bank under the Act; and

(3) have Trust Company engage in any transactions with affiliates, other than the payment of dividends to U.S. Trust or the infusion of capital by U.S. Trust into Trust Company, without the Board's approval.

Since these conditions precluded Trust Company from engaging in commercial lending, the Board found that Trust Company was not a "bank" within the meaning of Section 2(c) of the Act. The Board's order lamented that although "approval of this proposal presents a serious potential for undermining the policies of the Act, the Board is constrained by the definition of bank in the Act to approve the application." The Board further rejected the petitioners' request for an evidentiary hear-

3 These parties will be collectively referred to as petitioners.

ing, deeming the issues in the application to be legal in nature not warranting a hearing on factual issues. All of petitioners' requests for reconsideration were denied by the Board. The Board also refused to stay its order. Although it sanctioned the U.S. Trust application, the Board was plainly unenthusiastic about the course it was adopting. The order itself contained a plea for Congressional action because:

> if the nonbank concept, particularly as expanded by the interpretation of demand deposit adopted by the Tenth Circuit,[4] becomes broadly generalized, a bank holding company or commercial or industrial company, through exploitation of an unintended loophole, could operate "banks" that offer NOW accounts and make commercial loans in every state, thus defeating congressional policies on commingling of banking and commerce, conflicts of interest, concentration of resources and excessive risk, or with respect to limitations on interstate banking. Congressional action thus is urgently needed to ensure that the policies of the Act are maintained. In this regard, the Board does not believe that any public policy would be served by grandfathering proposals such as this that occur subsequent to the introduction of legislation that would otherwise prohibit such transactions.

Thus, the Board, in the very order granting U.S. Trust's application, emphasized its prior opinions that "an institution that is chartered as a bank and that accepts transaction accounts from the public should be subject to the policies that Congress has established for banks in the BHC Act." Order at 3. See Citizens Fidelity Corp., 69 Federal Reserve Bulletin 556 (1983); Citicorp, 70 Federal Reserve Bulletin 921 (1984); Mellon National Corp., 70 Federal Reserve Bulletin 441 (1984).

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4 *First Bancorporation v. Board of Governors*, 728 F.2d 434 (10th Cir. 1984). The board is seeking a rehearing of this case—which involved the issue of whether a negotiable order of withdrawal (NOW) account was a demand deposit for purposes of the Act—before the Tenth Circuit.

V. Appeal to the Eleventh Circuit

On April 28, 1984, the Florida Department of Bank and Finance petitioned us for review of the Board's order. The Florida Bankers Association and Sun Bank/Palm Beach filed similar petitions. U.S. Trust and the Conference of State Bank Supervisors then filed motions to intervene as a respondent and as a petitioner, respectively. We granted these motions.

VI. Decision

On its face, this appeal involves nothing more than a question of statutory interpretation. To state our problem so simply, however, is to belie its complexity. As we write, an avalanche of applications by bank holding companies seeking to establish hundreds of deposit-taking institutions across state lines is in progress.

The Board and U.S. Trust believe Congress' definition of a bank to be clear. They would have us rely on the well established principle of statutory construction that an agency or court cannot modify the clear language of a statutory provision. *See, e.g., American Tobacco Company v. Patterson,* 456 U.S. 63, 102 S. Ct. 1584, 71 L.Ed.2d 748 (1982); *Central Trust Company v. Official Creditors Committee,* 454 U.S. 354, 102 S. Ct. 695, 70 L.Ed.2d 542 (1982). Petitioners counter with the equally well established rule of statutory interpretation that courts ought not to apply the literal terms of a statute to reach a result contrary to the underlying policy of Congress. They rely on the many reported decisions where courts have gone beyond the face of the statute to ascertain congressional intent and purpose. *See, e.g., United States v. American Trucking Association,* 310 U.S. 534, 543, 60 S. Ct. 1059, 84 L.Ed. 1345 (1940);[5] 2A

5 There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even *when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy*

Sutherland, *Statutes and Statutory Construction*, § 46.07 (C. Sands 4th ed. 1978).

In its order, the Board concluded that the Act's definition of bank in § 2(c) did not permit a more expansive interpretation on which to deny the U.S. Trust application. In effect, the Board was persuaded to approve the U.S. Trust application by the argument that the Act is a comprehensive regulation of the banking industry with carefully defined terms. The Board was reluctant to look through the definition of bank to see the substance of the U.S. Trust application. Although we believe the words used by Congress to define bank to be clear in the sense that a meaning is intelligible, that is not tantamount to a decision that we should inquire no further. Literalism in statutory interpretation, when it is contrary to an express purpose of the Act, cannot be a talisman.

(a) *The Changing Definition of Bank*

Congress twice has amended the Act's definition of bank prior to the present controversy. In each prior case, the legislative history leaves no doubt that the purpose of the amendment was to delineate more clearly which institutions would be subject to regulation under the Act in light of the Board's experiences with regulation. The original 1956 Act defined bank in terms of the charter of the entity. This first definition included "any national banking association or state bank, savings bank, or trust company."[6] Chapter 240, § 2(c), 70 Statutes 133. In 1966 Congress amended the Act to provide a narrower definition of bank. This definition included only institutions "that accept

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of the legislation as a whole' this Court has followed that purpose, rather than the literal words. (emphasis supplied).

6 (c) "Bank" means any national banking association or any State bank, savings bank, or trust company, but shall not include any organization operating under sections 611 and 612 of this title, or any organization which does not do business within the United States. "State member bank" means any State bank which is a member of the Federal Reserve System. "District bank" means any State bank organized or operating under the Code of Law for the District of Columbia.

deposits payable on demand."[7] This amendment was specifically intended to exclude savings and industrial banks, thus leaving only commercial banks subject to the Board's regulation.[8] As the Senate report stated, the deposit test has long been the accepted definition of what constitutes a commercial bank.

> Section 2(c) of the Act [i.e. prior to its amendment in 1966] defines "bank" to include savings banks and trust companies, as well as commercial banks. The purpose of the Act was to restrain undue concentration of control of commercial bank credit, and to prevent abuse by a holding company of its control over this type of credit for the benefit of its nonbanking subsidiaries. This objective can be achieved without applying the Act to savings banks, and there are at least a few instances in which the reference to "savings bank" in the present definition may result in covering companies that control two or more industrial banks. *To avoid this result, the bill redefines "bank" as an institution that accepts deposits payable on demand (checking accounts), the commonly accepted test of whether an institution is a commercial bank so as to exclude institutions like industrial banks and nondeposit trust companies.*

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7 (c) "*Bank*" means any institution that accepts deposits that the depositor has a legal right to withdraw on demand, but shall not include any organization operating under section 25 or section 25(a) of the Federal Reserve Act, or any organization that does not do business within the United States. "District bank" means any bank organized or operating under the Code of Law for the District of Columbia.

8 Savings banks are financial institutions organized historically "to encourage thrift among persons of modest means by paying interest dividends on savings deposited therein." G.G. Munn, Encyclopedia of Banking and Finance (8th ed.), 852. Industrial banks are those institutions which are chartered by state law to extend installment credit to consumers and to accept some form of savings deposit or sell investment certificates or certificates of deposit as a means of financing the operation. *See* Industrial Banks as Thrift Institutions, American Financial Service Association Research Report (1982).

Senate Report No. 1179, 89th Cong., 2d Sess. 7, reprinted in 1966 U.S. Code Cong. & Adm. News 2385, 2391. (emphasis added)

In 1970, Congress again amended the Act's definition of bank.[9] This amendment, which is the definition presently before us, added the requirement that an entity make commercial loans, as well as accept demand deposits, to be a bank. 12 U.S.C. § 1841(c)(2), Public Law No. 91-607, § 101(c), 84 Statutes 1762 (1970). The Report of the Senate Committee on Banking and Currency explained the 1970 amendment as follows:

> The definition of "bank" adopted by Congress in 1966 was designed to include commercial banks and exclude those institutions not engaged in commercial banking, since the purpose of the Act was to restrain undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit. However, the Federal Reserve Board has noted that this definition may be too broad and may include institutions which are not in fact engaged in the business of commercial banking in that they do not make commercial loans. The committee, accordingly, adopted a provision which would

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9 (c) "Bank" means any institution organized under the laws of the United States, any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands, except an institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or an institution chartered by the Federal Home Loan Bank Board, which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans. Such term does not include any organization operating under section 25 or section 25(a) of the Federal Reserve Act, or any organization which does not do business within the United States except as an incident to its activities outside the United States. "District bank" means any bank organized or operating under the Code of Law for the District of Columbia. The term "bank" also includes a State chartered bank or a national banking association which is owned exclusively (except to the extent directors' qualifying shares are required by law) by other depository institutions or by a bank holding company which is owned exclusively by other depository institutions and is organized to engage exclusively in providing services for other depository institutions and their officers, directors, and employees.

> exclude institutions that are not engaged in the business of making commercial loans from the definition of "bank."

Senate Report No. 1084, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 5519, 5541. Crucial to an understanding of our present problem is the widespread impression throughout Congress that the 1970 amendment was predicted to have an extremely narrow impact. As the legislative history reveals, in 1970 there was only one significant financial institution, the Boston Safe Deposit and Trust Company, that accepted demand deposits but made no commercial loans.[10]

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10 Specifically, in response to an inquiry from the Senate Committee on Banking and Currency, Governor Robertson of the Board advised:

> *[T]his amendment would have very limited application at present, possibly affecting only one institution*. Since there is less need for concern about preferential treatment in extending credit where no commercial loans are involved, and in view of the very limited application of this amendment, the Board would have no objection to its adoption.

One-Bank Holding Company Legislation of 1970: Hearings on S. 1052, et al. before the Senate Comm. on Banking and Currency, 91st Cong., 2d Sess., 136-37 (1970) (emphasis added) The one institution affected by the amendment was the Boston Safe Deposit and Trust Company, evidently the only bank at the time which accepted demand deposits but engaged in no commercial lending. *See* 116 Cong. Rec. 25848 (1970) (remarks of Representative Gonzalez).

Indeed, the redefinition of bank can be seen as a bit of local favoritism on the part of Senator Brook of Massachusetts. The two part definition appeared to exempt a valued local institution without affecting other commercial banks. This redefinition of bank brings to mind Congress' action when dealing with the Dupont Trust in Florida as it originally passed the Act in 1956. The trust, which owned several banks and thus would have come under the regulation of the Board, received a narrowly tailored exception for charitable trusts and was exempted from the original scope of the Act. As the Senate Report discussing abolition of the trust exemption makes clear, No. 1179, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. & Ad. News 2385, 2387-88:

> The principal entity which now receives the benefit of the exemption for long-term trusts and which in the course of time would become a charitable institution is the Alfred I. du Pont trust fund, created under the will of the late Alfred I. du Pont. This is a perpetual testamentary trust under which the testator's widow was left virtually all of the income during

(b) *The Purpose of the Act*

The legislative history reveals that Congress had three purposes in adopting the Act in 1956. The first two, which the Board and U.S. Trust acknowledge, were to prevent bank holding companies from (1) acquiring additional banks in a manner which would concentrate banking facilities within a particular area, and (2) combining under single control both banking and nonbanking enterprises in a manner which would enable holding companies to use bank deposits to finance unrelated nonbanking activities. It seems to us, however, that the Board and U.S. Trust ignore the third purpose of Congress, namely, to prohibit the creation of interstate deposit-taking networks by bank holding companies without specific state authorization.

Congress' desire to prevent bank holding companies from acquiring deposit-taking banks across state lines without state authorization was expressed dramatically in its adoption of the Douglas amendment.[11] That amendment, which remains essentially unaltered since the passage of the original Act, was designed to place federal power on the side of state control over banking. The Douglas amendment made the expansion of banking in a state by out-of-state bank holding companies subject to that state's direct and express approval. Such federal deference to state policies was made clear by Senator Douglas when he likened his amendment to the McFadden Act, 12 U.S.C. § 36. In the McFadden Act Congress prohibited national banks from establishing interstate branches (defined as any facilities which receive deposits or paychecks or make loans) unless state law expressly permitted state banks to establish intrastate branches.

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her life subject to annuities, and, thereafter the entire income would be payable to the Nemours Foundation, a charitable institution primarily for the benefit of crippled children. A 12-percent share of the life tenant's income has been irrevocably assigned to the Nemours Foundation.

The DuPont trust controlled 30 banks in Florida, together with sizeable nonbank businesses. Thus, technical amendments to favor specific limited local interests have had a place in the Act since its original passage.

11 *See* footnote 2.

With our examination of Congress' goals in adopting the Act behind us, we now consider the question of whether it is reasonable to conclude that Congress intended in 1970 to destroy the Douglas Amendment by adopting an amendment to the definition of bank which would permit bank holding companies to establish an unlimited number of deposit-taking banks across state lines without state approval. Merely to articulate this question in the light of the traditional Congressional concern that banking be subject to the local goals and policies of the states demonstrates the unreasonableness of the U.S. Trust position. We cannot persuade ourselves to employ literalism in statutory interpretation in order to bootstrap Congress' technical amendment of the definition of bank—after being told that the amendment would apply to only a single institution[12]—into a total emasculation of the long held policy giving states control over bank expansion. State control over banking, and the expansion and availability of branches, has been the consistent policy of Congress since passage of the Act in 1956. Viewed in historical perspective, state control over banking has been an important issue in American politics since the charter of the First Bank of the United States.[13]

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12 *See* footnote 8.

13 Dispute over control of banking reached a crisis in Andrew Jackson's war on the recharter of the Bank of the United States. Even though historians have viewed Nicholas Biddle as a good, if somewhat despotic President of the Bank, and Andrew Jackson's precipitous withdrawal of federal moneys from the bank as instrumental in bringing on a nationwide panic, the war for recharter was in reality an extended debate over who would control banking. Jackson sided with state control by placing federal deposits in state chartered banks. Biddle's monster bank was slain since neither Clay nor Webster were able to ride the bank issue into the White House.

From that time until the passage of modern banking legislation in this century, the federal government has not used its power to permit uncontrolled expansion by banks. Indeed, as above mentioned, it was precisely the development of the bank holding company—with the concern this phenomena generated about the concentration of financial power—that led to passage of the Bank Holding Company Act of 1956. Congress rendered state control over bank expansion explicit in the 1956 Act when it adopted the Douglas Amendment.

There is no dispute that U.S. Trust will accept demand deposits and would therefore be a commercial bank within the commonly accepted test set forth in the 1966 amendment to the definition of bank. For Congress to have completely reversed its field only four years later and to have decided that all commercial banks accepting demand deposits would no longer be subject to the strictures of the Douglas amendment unless they also made commercial loans indicates a dramatic change of heart. Such a change of heart is usually accompanied by protracted debate in Congress. Indeed, the *raison d'etre* of legislative history is to illumine such shifts in thinking on the part of Congress. However, not even U.S. Trust, let alone the Board, can glean from the legislative history of the 1970 amendment to § 2(c) such a change in congressional intent.

We are reluctant to attribute to a technical amendment, in the absence of compelling legislative history, Congress' intention to abandon a central part of the policies leading to the passage of the 1956 Act. Without such expression on the part of Congress, the wholesale expansion of deposit-taking institutions across state lines cannot be justified in violation of the Douglas amendment. The more reasonable interpretation of the 1970 amendment is that Congress intended to exempt, much like it did with the Dupont Trust in 1956,[14] a single intrastate institution—or perhaps the very few entities similarly situated—which could be excluded from regulation under the Act without giving rise to the kind of abuses which the Douglas amendment was designed to prevent.[15]

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14 *See* footnote 8.

15 We are aware, of course, that the Tenth Circuit Court of Appeals in its recent decision in *Dimension Financial Corp. v. Board of Governors of the Federal Reserve System*, 744 F.2d 1402 (10th Cir. 1984), has concluded the 1970 amendment to § 2(c) "permitted the development of the nonbank banks . . . and contemplated that some institutions would not be included [as banks under the Act]". In its decision setting aside the Board's new definition of commercial loan in Regulation Y, 12 C.F.R. part 225, § 225.2, the Tenth Circuit did not, however, rule specifically on whether nonbank banks could be established without regard to the Douglas Amendment. The Board is seeking a rehearing before the Tenth Circuit. We

To have us avoid consideration of the Douglas Amendment, and its policy of state control over bank expansion, U.S. Trust and the Board focus on § 4(c)(8), which permits bank holding companies to acquire nonbanking activities that are closely related to banking. They argue that Congress' purpose in passing this provision was "to permit the introduction of new innovative competitive vigor into those markets which would benefit therefrom." House Report No. 1747, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 5561, 5568. U.S. Trust would have us rely upon the conclusion in the Board's opinion that "there is no evidence that consummation of this proposal would result in any conflicts of interest, unsound banking practices, or other adverse effects." Such a conclusion on the part of the Board must be tempered by an understanding that the majority of the Board voted to approve the U.S. Trust application because of their belief that they were constrained to do so by the literal definition of "bank". As the dissent clearly stated:

> although the majority feels compelled to approve the application on grounds that U.S. Trust Company does not come within the Board's broad definition of "bank," I would deny the proposal because it would have the practical effect of permitting a bank holding company to engage in interstate banking without express authorization of state law in a manner that would otherwise be prohibited by the Douglas Amendment . . . . Moreover, under section 4(c)(8) of the Act, the Board may deny a proposal if it determines that the adverse effects of the proposal are not outweighed by any public benefits associated with the proposal.

The dissent clearly believed that U.S Trust urges a position that is plainly inconsistent with the purpose of the Douglas Amendment to prevent undue concentration of power and certain conflicts of interest. Even the majority, which felt constrained to approve the U.S. Trust application, was concerned that "if

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acknowledge that our present decision is in conflict with some of the language used by the Tenth Circuit in *Dimension*.

the nonbank concept . . . becomes broadly generalized, a bank holding company . . . through exploitation of an unintended loophole, could operate 'banks' . . . defeating Congressional policies on interstate banking.''[16] Accordingly, we cannot accept U.S. Trust's argument that the fact that the Board approved its application, however reluctantly, ends any further inquiry on our part. Our duty is to review the decision of the Board and ascertain whether it has correctly followed the congressional policies expressed in the Act. We perceive the U.S Trust application to be a violation of the Douglas Amendment; such a violation cannot be justified by the Board's power under § 4(c)(8) to approve activities closely related to banking. Activities approved as closely related to banking have been the acquisition of brokerage services or the offering of credit life insurance, not the wholesale abandonment of one of Congress' chief goals in enacting the Bank Holding Company Act.

Additionally, we believe U.S. Trust's argument that its nonbank will have an innovative and competitive effect on the market for financial resources in Florida to be erroneous. Since U.S. Trust cannot make commercial loans in Florida from the deposits it attracts, it is patent that Florida's policy of having local money available for local development will be hindered. While it is true that funds can be secured from out-of-state—indeed from U.S. Trust in New York—such a policy is directly contrary to the accepted notion that local funding of local projects is a significant and important incident of state control over banking. It suffices that Florida has spoken clearly that it does not want out-of-state bank holding companies to establish banking operations in Florida.[17] To approve the U.S. Trust application would destroy Florida's state policy to not allow the

16 *See [supra].*

17 The Board's and U.S. Trust's reliance on *Lewis v. B.T. Investment Managers*, 447 U.S. 27, 100 S. Ct. 2009, 64 L.Ed.2d 702 (1980), is misplaced. In that case the Court struck down a Florida statute which prohibited out-of-state bank holding companies from offering investment advisory services despite Board approval. Such services are incidents of banking requiring Board approval under the Act. This decision cannot be relied upon for the proposition that banks—deposit-taking institutions—can be established across state lines despite the Douglas Amendment.

unfettered expansion of out-of-state bank holding companies. More importantly, such approval would also destroy the important federal policy embodied in the Douglas amendment—a federal policy which allows the state to choose for itself whether to open its borders to out-of-state banks.

(c) *The Board's Power to Deny the U.S. Trust Application*

We hold that the Board should have used its power under § 5(b), 12 U.S.C. § 1844(b), to prevent evasion by U.S. Trust of the fundamental purposes of the Act. Section 5(b) expressly authorizes the Board "to issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of [the Act] and prevent evasions thereof." The rationale of the Third Circuit in *Wilshire Oil Co. v. Board of Governors*, 668 F.2d 732 (3d Cir. 1981), *cert. denied*, 457 U.S. 1132, 102 S. Ct. 2958, 73 L.Ed.2d 1349 (1982), supports such a use of the Board's delegated authority under § 5(b). Wilshire Oil Company's bank subsidiary, which accepted demand deposits and made commercial loans, notified its demand deposit customers that in the future it would reserve the right to require 14 days notice before any withdrawal could be made from their accounts. The bank, however, also notified its customers that it had no intention of exercising this right. In other words, the bank in practice continued to accept demand deposits and make commercial loans even though the depositors technically had no legal right to immediately receive their money. Thus, the bank argued it no longer met the definition of a bank in § 2(c) because Congress in the 1970 amendments defined bank to require demand deposits and commercial loans. The Board had no trouble looking through the form of the bank's reorganization to its substance. The Board disregarded the technical nonconformity with the definition of bank and ruled that the subsidiary was still acting as a bank and was subject to the Act. While *Wilshire* is distinguishable in the sense that the bank was blatantly attempting to evade the Act, its rationale that the Board under § 5(b) had the power to disregard the form of a reorganization and look to its substance supports a similar use of

the § 5(b) power by the Board in this case. The Board is Congress' custodian of the Act. In that capacity, it is charged with insuring compliance with Congress' goals even when Congress muddies the waters.

VII. Conclusion

Since we have held that the Board should have used its authority under § 5(b) to deny the U.S. Trust application, we express no opinion on the constitutionality of the Florida statute or the parties' contention that an evidentiary hearing was required by the Board prior to its action.

REVERSED.

FEDERAL RESERVE SYSTEM

U.S. Trust Corporation
New York, New York

Order Approving Expansion of Activities of Trust Company to Include Checking Accounts and Consumer Lending
(70 Fed. Res. Bull. 371)

U.S. Trust Corporation, New York, New York, a bank holding company within the meaning of the Bank Holding Company Act (12 U.S.C. § 1841 *et seq.*) ("Act"), has applied for approval under section 4(c)(8) of the Act (12 U.S.C. § 1843(c)(8)) and section 225.23(a)(1) of the Board's Regulation Y (12 C.F.R. § 225.23(a)(1)) to expand the activities of its subsidiary, U.S. Trust Company, Palm Beach, Florida ("Trust Company"), to include the acceptance of time and demand deposits, including checking accounts, and the making of consumer loans. These activities have been previously determined by the Board to be closely related to banking. 12 C.F.R. § 225.25(b)(1); *First Bancorporation* (Beehive Thrift & Loan), 68 Federal Reserve Bulletin 253 (1982); *Citizens Fidelity Corporation*, 69 Federal Reserve Bulletin 556 (1983).

Notice of the application, affording opportunity for interested persons to comment, has been duly published (48 Federal Register 55178 (1983)). The time for filing comments and views has expired and the Board has considered the application and all comments received, including those submitted by the State of Florida, the Florida Bankers Association, the Conference of State Bank Supervisors, and Sun Bank/Palm Beach ("Protestants") in opposition to the proposal, in light of the factors set forth in section 4(c)(8) of the Act (12 U.S.C. § 1843(c)(8)).

Applicant is the 19th largest commercial banking organization in New York, with total consolidated assets of $1.8 billion. Applicant operates one subsidiary bank with total deposits of $1.2 billion.[1]

1 Deposit data are as of September 30, 1983.

Trust Company at present is a state chartered nondepository trust company that engages in the provision of fiduciary, investment advisory, agency, and custody services for local customers in Florida. Applicant has stated that Trust Company will convert to a national bank charter prior to engaging in the proposed activities and will obtain FDIC insurance for its deposits. Trust Company proposes to offer a number of different types of deposit accounts to the general public, including checking accounts with a minimum deposit of $10,000. Trust Company also will offer loans to individuals for personal, family, household, or charitable purposes.

Applicant has stated that Trust Company will not engage in the business of making commercial loans, including the purchase of commercial paper or certificates of deposit, the sale of federal funds, or any transactions that the Board has defined as commercial loans in its recent revisions to Regulation Y. Applicant states that Trust Company's excess funds will be invested in investment securities permitted for national banks under 12 U.S.C. section 24 (seventh). Applicant does not currently engage in any commercial lending activities or operate any other subsidiaries in Florida. Moreover, Applicant has stated that Trust Company will not channel funds to any commercial lending affiliate or engage in any transactions with affiliates without the Board's approval. Accordingly, it appears that Trust Company will not engage in the business of making commercial loans either directly or indirectly.

"Bank" Definition.

This proposal raises a significant issue as to whether the acceptance of demand deposits through an FDIC insured national bank can be regarded as a permissible nonbanking activity under the Act. The Board on a number of occasions has expressed its views that an institution that is chartered as a bank and that accepts transaction accounts from the public should be subject to the policies that Congress has established for banks

in the BHC Act.[2] Nevertheless, although the Board believes that approval of this proposal presents a serious potential for undermining the policies of the Act, the Board is constrained by the definition of bank in the Act to approve the application.

The Act defines a "bank" as an institution that both accepts demand deposits and engages in the business of making commercial loans. (12 U.S.C. § 1841(c)). In its recent action defining the term "bank," (12 C.F.R. § 225.2(a)(1)), the Board acted to the extent possible consistent with the language, legislative history and policies of the Act to bring within the scope of the Act those institutions that the Board believes Congress intended to subject to the Act's limitations on conflicts of interests, concentration of resources, and excessive risk. It was the Board's intention, in part, to bring within the scope of the policies of the Bank Holding Company Act those institutions that engage in essential banking functions that the Board believes Congress intended to be covered by these policies.

The activities proposed by Trust Company have been tested against this definition of bank. As noted above, Trust Company will accept demand deposits but not make commercial loans as defined by the Board in Regulation Y. Thus, Trust Company will not be a bank within the meaning of the Bank Holding Company Act. In this situation, where the applicant will not make commercial loans in Florida either directly or indirectly through any affiliate, the Board does not have the discretion to find that the proposal falls within the prohibitions on interstate acquisitions contained in section 3(d) of the Act (12 U.S.C. § 1842(d)), which only applies to the acquisition of banks as defined in section 2(c) of the Act.

The Board also has considered that companies other than bank holding companies have acquired banks that offer transaction accounts without being subject to the Act. The Board believes that it would be ineffective and inequitable to impose a competitive limitation only on bank holding companies by denying this proposal.

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2 *Citizens Fidelity Corporation, supra. See also Citicorp,* 70 Federal Reserve Bulletin 231 (1984); *Mellon National Corporation,* 70 Federal Reserve Bulletin 234 (1984).

Protestants' Comments.

Protestants argue, however, that the Board should view U.S. Trust Corporation as a single entity engaged in commercial banking operations by accepting demand deposits through U.S. Trust Company and in commercial lending through other subsidiaries in Florida in violation of section 3(d) of the Act. As noted, however, Applicant does not directly or indirectly engage in commercial lending through any subsidiary in Florida. Under these circumstances, the Board cannot conclude that Trust Company is a bank under the Act subject to the restrictions of section 3(d).

Protestants also argue that the proposal would violate the provision in Florida law that prohibits an out-of-state bank holding company from acquiring "any bank or trust company having a place of business in [Florida] where the business of banking or trust business or functions are conducted." Florida Statutes, § 658.29(l). It is the Board's general policy to presume the constitutionality of state statutes unless there is clear and unequivocal evidence of the inconsistency of the state law with the federal Constitution.[3] In this case, the Supreme Court has held a predecessor to the Florida statute unconstitutional to the extent that it prohibited out-of-state bank holding companies from offering investment advisory services.[4] Moreover, a U.S. district court has recently held that the very Florida statute at issue in this case constitutes an unconstitutional burden on interstate commerce to the extent that it seeks to prevent out-of-state bank holding companies from operating in Florida entities that do not meet the definition of "bank" in the Bank Holding Company Act.[5] Accordingly, the proposal does not appear to be barred by any valid provision of state law.

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3 *NCNB Corp.*, 68 Federal Reserve Bulletin 54, 56 (1982). The Board has previously stated that it is doubtful that a state has the authority to impose a more stringent burden on interstate commerce than that contained in section 3(d). *KASD, Inc.*, 70 Federal Reserve Bulletin 44 (1984).

4 *Lewis v. B.T. Investment Managers*, 477 U.S. 27 (1980).

5 *Continental Illinois Corporation v. Lewis*, TCA 81-09944-WS (slip opinion dated December 13, 1983).

Need for Congressional Action.

The requirement of Board approval of this application under the provisions of existing law is one of a number of recent developments that underscore the critical need for Congressional action on legislation to apply the policies of the Bank Holding Company Act to institutions that are chartered as banks and that offer transaction accounts to the public. The recent decision of the Tenth Circuit Court of Appeals reversing the Board's interpretation of NOW accounts as demand deposits in connection with a bank holding company acquisition of a Utah industrial loan company,[6] and the continued acquisition of nonbank banks by securities, insurance, and other nonbanking organizations present the potential for a significant, haphazard, and possibly dangerous alteration of the banking structure without Congressional action on the underlying policy issues.

If the nonbank bank concept, particularly as expanded by the interpetation of demand deposit adopted by the Tenth Circuit, becomes broadly generalized, a bank holding company or commercial or industrial company, through exploitation of an unintended loophole, could operate "banks" that offer NOW accounts and make commercial loans in every state, thus defeating Congressional policies on commingling of banking and commerce, conflicts of interest, concentration of resources and excessive risk, or with respect to limitations on interstate banking. Congressional action thus is urgently needed to ensure that the policies of the Act are maintained. In this regard, the Board does not believe that any public policy would be served by grandfathering proposals such as this that occur subsequent to the introduction of legislation that would otherwise prohibit such transactions.

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6 *First Bancorporation v. Board of Governors* (10th Cir. 1984 slip opinion dated February 21, 1984). The Board is seeking a rehearing of the case before the Tenth Circuit.

Other Considerations.

There is no evidence that consummation of this proposal would result in any conflicts of interest, unsound banking practices, or other adverse effects. The Board believes that it is appropriate, however, to take action to ensure that Trust Company is not used by Applicant as a vehicle for evasion of section 3(d). Accordingly, the Board has determined to make its approval subject to the conditions that:

(1) Applicant will not operate Trust Company's demand deposit taking activities in tandem with any other subsidiary or other financial institutions;

(2) Applicant will not link in any way the demand deposit and commercial lending services that define a bank under the Act; and

(3) Trust Company will not engage in any transactions with affiliates, other than the payment of dividends to Applicant or the infusion of capital by Applicant into Trust Company, without the Board's approval.

Protestants have requested a hearing because of the serious policy issues raised by the subject proposal and because they claim that there are certain factual questions that need clarification. The Board has concluded that the issues in this case are legal in nature and that there are no material factual issues in dispute that would warrant a hearing on the application. Accordingly, Protestants' hearing request is denied.

Based upon the foregoing and all the facts of record, the Board has determined that the balance of public interest factors it is required to consider under section 4(c)(8) is favorable. Accordingly, the application is hereby approved. This determination is subject to the conditions set forth in this Order with respect to transactions and operations in tandem with any other subsidiary of Applicant or other financial institutions and the conditions set forth in section 225.23(b) of Regulation Y (12 C.F.R. § 225.23(b)). The approval is also subject to the Board's authority to require modification or termination of the activities of the holding company or any of its subsidiaries as the Board finds necessary to assure compliance with the pro-

visions and purposes of the Act and the Board's regulations and orders issued thereunder, or to prevent evasion thereof.

This transaction shall not be consummated later than three months after the effective date of this Order, unless such period is extended for good cause by the Board, or by the Federal Reserve Bank of New York pursuant to delegated authority.

By order of the Board of Governors,[7] effective March 23, 1984.

(signed) James McAfee

James McAfee
Associate Secretary of the Board

[SEAL]

Dissenting Statement of Governor Rice

I agree with the Board's order to the extent that it recognizes the serious implications of this proposal and makes strong recommendations for Congressional action. Although the majority feels compelled to approve the application on grounds that U.S. Trust Company does not come within the Board's broad definition of "bank," I would deny the proposal because it would have the practical effect of permitting a bank holding company to engage in interstate banking without express authorization of state law in a manner that would otherwise be prohibited by the Douglas Amendment. It also provides a precedent for acquisitions of national banks that accept demand deposits by nonbanking organizations without regard to the fundamental policy of the Bank Holding Company Act against commingling of banking and commerce.

In my view, the Board is not limited by the technical definition of "bank" and has authority to deny this application using its broad discretionary powers to take appropriate action to prevent

7 Voting for this action: Chairman Volcker and Governors Martin, Walich, and Partee. Voting against this action: Governor Rice. Absent and not voting: "Governors Teeters and Gramley."

evasions of the Act. Moreover, under section 4(c)(8) of the Act, the Board may deny a proposal if it determines that the adverse effects of the proposal are not outweighed by any public benefits associated with the proposal. I believe that the adverse effects of this proposal are so seriously adverse as to outweigh any public benefits. Accordingly, I would deny the proposal.

March 23, 1984

PERTINENT SECTIONS OF THE BANK HOLDING COMPANY ACT

12 U.S.C. ¶¶ 1841 *et seq.*

§ 1841. Definitions

(a) (1) Except as provided in paragraph (5) of this subsection, ''bank holding company'' means any company which has control over any bank or over any company that is or becomes a bank holding company by virtue of this chapter.

(c) ''Bank'' means any institution organized under the laws of the United States, any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands, except an institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or an institution chartered by the Federal Home Loan Bank Board, which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans. Such term does not include any organization operating under section 25 or section 25(a) of the Federal Reserve Act, or any organization which does not do business within the United States except as an incident to its activities outside the United States. ''District bank'' means any bank organized or operating under the Code of Law for the District of Columbia. The term ''bank'' also includes a State chartered bank or a national banking association which is owned exclusively (except to the extent directors' qualifying shares are required by law) by other depository institutions or by a bank holding company which is owned exclusively by other depository institutions and is organized to engage exclusively in providing services for other depository institutions and their officers, directors, and employees.

§ 1842. Acquisition of bank shares or assets

Prior approval of Board as necessary; exceptions; disposition, time extension; subsequent approval or disposition upon disapproval.

(a) It shall be unlawful, except with the prior approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (4) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (5) for any bank holding company to merge or consolidate with any other bank holding company. . . .

Limitation by State boundaries.

(d)(1) Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

§ 1843. Interests in nonbanking organizations

Ownership or control of voting shares of any company not a bank; engagement in activities other than banking.

(a) Except as otherwise provided in this chapter, no bank holding company shall—

(1) after May 9, 1956, acquire direct or indirect ownership or control of any voting shares of any company which is not a bank, or

(c) *Exemptions.* The prohibitions in this section shall not apply to (i) any company that was on January 4, 1977, both a bank holding company and a labor, agricultural, or horticultural organization exempt from taxation under section 501 of Title 26, or to any labor, agricultural, or horticultural organization to which all or substantially all of the assets of such company are hereafter transferred, or (ii) a company covered in 1970 more than 85 per centum of the voting stock of which was collectively owned on June 30, 1968, and continuously thereafter, directly or indirectly, by or for members of the same family, or their spouses, who are lineal descendants of common ancestors; and such prohibitions shall not, with respect to any other bank holding company, apply to—

(8) shares of any company the activities of which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. In determining whether a particular activity is a proper incident to banking or managing or controlling banks the Board shall consider whether its performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices. In orders and regulations under this subsection, the Board may differentiate between activities commenced de novo and activities com-

menced by the acquisition, in whole or in part, of a going concern.

§ 1844. Administration

Regulations and orders.

(b) The Board is authorized to issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of this Act and prevent evasions thereof.

PERTINENT REGULATION OF THE FEDERAL RESERVE BOARD

12 C.F.R. § 225.2(a)(1):

Definitions

Except as modified in this section or unless the context otherwise requires, the terms used in this regulation have the same meanings as set forth in the relevant statutes.

(a)(1) "Bank" means any institution organized under the laws of the United States that:

(i) Accepts deposits that the depositor has a legal right to withdraw on demand and

(ii) Engages in the business of making commercial loans. . . .

THE CHANGE IN THE DEFINITION OF BANK, 12 U.S.C. § 1842(c)

1956: "Bank" means any national banking association or any State bank, savings bank, or trust company, but shall not include any organization operating under section 25(a) of the Federal Reserve Act, or any organization which does not do business within the United States. "State member bank" means any State bank which is a member of the Federal Reserve System. "District bank" means any State bank organized or operating under the Code of Law for the District of Columbia.

1966: "Bank" means any institution that accepts deposits that the depositor has a legal right to withdraw on demand, but shall not include any organization operating under section 25 or section 25(a) of the Federal Reserve Act, or any organization that does not do business within the United States. "District bank" means any bank organized or operating under the code of Law for the District of Columbia.

1970: "Bank" means any institution organized under the laws of the United States, any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans. Such term does not include any organization operating under section 25 or section 25(a) of the Federal Reserve Act, or any organization which does not do business within the United States except as an incident to its activities outside the United States.

May 19, 1978

Joshua M. Berman
Goodwin, Procter & Hoar
28 State Street
Boston, Massachusetts 02109

Dear Mr. Berman:

This will respond to your letter of May 9, 1970 on behalf of The Boston Company, Inc. (''TBC''), requesting the staff's opinion that TBC will not become a bank holding company with respect to its subsidiary, Boston Safe Deposit and Trust Company (''Boston Safe''), if Boston Safe implements its proposed Trust Banking Program.

It is my understanding from your letter that Boston Safe is engaged principally in the trust business, and that it accepts demand deposits but does not make loans to commercial entities. Section 2(c) of the Bank Holding Company Act (''Act'') defines a bank as an institution that both accepts demand deposits and engages in the business of making commercial loans. The Board has previously stated that for the purposes of this section, commercial loans include all loans made for other than personal, family or household purposes or for charitable purposes.

In your letter you state that in implementing its proposed Trust Banking Program, Boston Safe intends to provide its individual clients with various personal financial services, such as trust services, financial counselling services and personal banking services. Among the personal banking services, Boston Safe intends to offer its clients a personal unsecured line of credit, which could be drawn upon through the client's checking account. In addition, this line of credit may be offered in connection with the American Express Gold Card Program, whereby the line of credit may be used to pay charges incurred through the use of the American Express Card. Boston Safe will offer its Trust Banking Program only to individuals and it

contemplates that in most cases the maximum amount of the line of credit under the Trust Banking Program will be $5,000.

You further state that Boston Safe proposes to establish certain procedures to assure that the loans made in connection with its Trust Banking Program will not be viewed as commercial loans under the Act. In particular, the loan application form and loan agreement will contain statements that all loans made under the agreement must be used by the borrower solely for personal, family or household purposes or charitable purposes (hereinafter referred to collectively as "personal purposes"), and that the proceeds may not be used for the payment of any business or commercial obligations of the borrower. Furthermore, the loan agreement will provide that the use of the proceeds of the loan for other than personal purposes will constitute an event of default under the loan agreement and will subject the loan to immediate repayment. In addition, the Trust Banking Officer assigned to each client in the Trust Banking Program will stress to the client that the line of credit from Boston Safe should be used exclusively for personal purposes.

Based on the foregoing, it is my opinion that Boston Safe will not be a bank within the meaning of section 2(c) of the Act by virtue of its making loans to individual clients under its Trust Banking Program in the manner and under the conditions described above, and that TBC will not become a bank holding company with respect to Boston Safe by virtue of its making such loans. I have based my opinion in particular on the fact that in most cases the maximum amount of the loans extended under the Trust Banking Program will be $5,000, and upon the measures that Boston Safe intends to take to ensure that the proceeds of the loans are not used for other than personal purposes. Furthermore, it should be noted that if Boston Safe becomes aware that the proceeds of any loan under the Trust Banking Program have been used for other than personal purposes, the amounts of any such loans must be aggregated with Boston Safe's other commercial loans for the purposes of determining whether it is within the limitations on commercial loans imposed by the Board in its letter of June 7, 1972.

Of course, the opinion herein represents the views of the staff based on the information presented, and any material changes in any of these facts or the existence of any material fact that may not have been brought to our attention would require reassessment of the views expressed herein.

Very truly yours,

Neal L. Peterson
General Counsel

SUMMARY OF NON-BANK BANK APPLICATIONS FILED WITH THE OFFICE OF THE COMPTROLLER OF THE CURRENCY

(as of 11:00 a.m., June 28th, 1985)

	Interstate Nonbank Bank Charters	Expension of Trust Company Powers
Number of Applicants*	58	18
Number or Applications*	368	19
No Demand Deposits	161**	1
No Commercial Loans*	207	18
TOTAL	368	19

* Totals include nineteen applications which have been withdrawn: 1) filed by Maryland National Corporation to be located in Washington, D.C.—no commercial loans; 2) filed by Chemical New York Corporation to be located in Wilmington, Delaware—no commercial loans; 3) filed by Marine Midland Banks to be located in Cincinnati, Ohio—no commercial loans; 4) filed by Key Banks, Inc. to amend the articles of association for Key Trust Company of Florida, Orlando, Florida—no commercial loans; 5) filed by First Chicago Corporation to be located in Dallas, Texas; New York, New York; Pasadena, California; Atlanta, Georgia; and West Orange, New Jersey—no commercial loans; and 6) 10 applications filed by H.F. Ahmanson & Company—no commercial loans.

** Applications filed for a nonbank bank in Wilmington, Delaware and one in Memphis, Tennesee. Banks will not accept demand deposits nor will they make commercial loans.

Source: Office of the Comptroller of the Currency.